

KENNETH R. COX
Claimant

J & J DRAINAGE PRODUCTS
Respondent

ZENITH INSURANCE CO.
Insurance Carrier

Claimant has been employed as a machine operator for 25 years. His job required him to stand all day while operating rolling and riveting machines. In 1978 claimant suffered a work-related injury when some steel fell and crushed his right leg. Treatment

included some skin grafting. After this injury claimant continued to have swelling in his leg and leg ulcerations. The claimant filed a workers compensation claim as a result of this incident.

In 1985 claimant suffered another work-related injury. Claimant used his foot to operate a machine and developed a blood clot in his right leg. Ultimately, treatment for this injury required a superficial saphenous vein stripping in the right leg due to abnormal veins. Claimant was required to wear support hose after this incident. A second workers compensation claim was filed as a result of this incident.

Claimant would occasionally develop venous stasis ulcers on his right leg. Claimant testified the last such incident occurred in September 1999. After a course of treatment the ulcer healed and claimant had no further problems until June 2001. Claimant continued to have swelling in his leg as he continued working but the swelling would diminish when he would be off his feet at home after work.

In early June 2001, claimant developed a leg ulcer and reported it to his supervisor as work-related because of standing at work. Claimant was referred to Christopher P. Rogers, M.D., and was taken off work until July 11, 2001. However, a few days later claimant discovered the insurance carrier had denied his claim. Claimant was advised by the respondent's human resource director he could not continue to see Dr. Rogers and he should go to his own doctor.

Dr. Rogers medical note dated June 27, 2001, contains the following:

The patient does not document any new workman's compensation injury to his right lower extremity. The patient's employer has a number of questions as to whether these injuries ought to be included in a current workman's compensation venue. I cannot answer those questions, and probably they are better left to the insurance carriers.

Claimant then sought treatment for his leg ulcer with David L. Dunlap, M.D. Dr. Dunlap noted claimant developed venous stasis ulcers which have been non-healing and occasionally infected despite persistent treatment and claimant's compliance with care instructions. In a letter to claimant's attorney dated December 12, 2001, Dr. Dunlap further stated:

These leg ulcers are a result of an on-the-job accident as an employee of J & J Drainage in about 1970 when his leg was crushed by steel. Since that time he has had difficulties with these recurrent leg ulcers. As a result of the most recent problems he has been taken off work and told to remain sitting or lying for most hours of the day to improve chances of healing the wound. He will not be able to return to any work requiring him to remain on his feet.

Standing contributes to the formation of these ulcers and in ability [sic] to heal the leg ulcers.

Respondent argues that both Drs. Rogers and Dunlap refer claimant's condition to his prior workers compensation claims. Respondent further argues that Dr. Dunlap's statement that standing contributes to the formation of the ulcers does not differentiate between standing at work and elsewhere.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.¹ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.² Under those circumstances the current injury would constitute a new accidental injury and would not be compensable as a direct and natural consequence of the original injury.

The question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activities aggravated, accelerated or intensified the underlying disease or affliction.³

Dr. Dunlap's statement that standing contributed to the development of the leg ulcers and inability for the ulcers to heal indicates both a causal relationship between work activities and the development of the ulcers as well as an intensification of the condition due to standing at work. In addition, claimant's statement that standing at work caused his leg ulcer to get worse supports a finding that claimant's work intensified his underlying condition.

There is often a fine line between mere exacerbation of symptoms and an aggravation such that there would be a new accidental injury for purposes of workers compensation. Based upon the current record, the Board finds that claimant's testimony establishes his condition has worsened as a result of his employment activities. The present need for medical treatment is the result of his worsened condition caused by his subsequent and continuing work activities. Based on the record compiled to date, the Administrative Law Judge's Order is affirmed.

¹Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

²Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997). See also Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1084 (1996).

³See, Boutwell v. Domino's Pizza, 25 Kan. App. 2d 100, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

Respondent next contends it is entitled to a credit against the temporary total disability compensation for unearned wages paid claimant while he was off work. After respondent refused to provide treatment for claimant's leg ulcers he sought treatment from his personal physician and was taken off work. After being off work for 21 days claimant became eligible for a respondent provided benefit denominated a salary continuation pay. The salary continuation pay is a partial amount of the claimant's normal salary in the sum of \$269 per week.

This is an appeal from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:⁴

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Is there any defense to the compensability of the claim?

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.⁵ Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly but includes the power to decide it wrongly. The test of jurisdiction is not a correct decision but the right to enter upon inquiry and make a decision.⁶

An Administrative Law Judge has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Therefore, Judge Moore did not exceed his jurisdiction. Whether claimant's receipt of salary continuation payments while off work entitles respondent to receive a credit against temporary total disability benefits is not an issue that is reviewable from a preliminary hearing order.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁷

⁴K.S.A. 44-534a.

⁵K.S.A. 44-551.

⁶See Taber v. Taber, 213 Kan. 453, 516 P.2d 987 (1973); Provance v. Shawnee Mission U.S.D. No. 512, 235 Kan. 927, 683, P.2d 902 (1984).

⁷K.S.A. 44-534a(a)(2).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated December 17, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2002.

BOARD MEMBER

c: Larry A. Bolton, Attorney for Claimant
 Jeffery R. Brewer, Attorney for Respondent
 Bruce E. Moore, Administrative Law Judge
 Philip S. Harness, Workers Compensation Director